

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, *et al.*,
Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, *et al.*,

Defendants-Respondents.

Case No. 2:18-cv-00928-MJP

**COMBINED JOINT STATUS REPORT
AND DISCOVERY PLAN**

1 Plaintiffs Yolany Padilla *et al.*, and Defendants U.S. Immigration and Customs
 2 Enforcement *et al.*, by and through their counsel of record, hereby submit this Joint Status Report
 3 and Discovery Plan pursuant to Federal Rule of Civil Procedure 26(f), Western District of
 4 Washington Local Civil Rule 26(f), and the Court's Order dated March 6, 2019. *See also* Dkt.
 5 32, 101.

6 **1. Statement of the Nature and Complexity of the Case:**

7 Plaintiffs' statement: This national class action suit challenges federal government
 8 policies and practices excessively prolonging the detention of asylum seekers in expedited
 9 removal proceedings by: (1) failing to promptly provide credible fear interviews and
 10 determinations, and (2) after an asylum seeker's positive credible fear determination, failing to
 11 provide timely bond hearings that comport with constitutional requirements. Plaintiffs assert
 12 these failures violate the Administrative Procedure Act; the Due Process Clause of the Fifth
 13 Amendment; and the Immigration and Nationality Act (INA) and its implementing regulations,
 14 including 8 U.S.C. §§ 1225(b) & 1158, 8 C.F.R. §§ 235.3(b)(4), 208.30. Plaintiffs believe that
 15 the Court can resolve most, if not all, of their claims on summary judgment.

16 Defendants' statement: This is a nationwide class action premised on Plaintiffs' ability to
 17 prove that it is unconstitutional in any instance for the government to take longer than 10 days to
 18 issue a credible fear determination, or seven days to conduct certain bond hearings. Because
 19 Plaintiffs contend that no other fact—other than the length of time in custody—matter to the
 20 legal question here, Defendants believe that the case presents a straightforward legal question
 21 that should require only limited discovery. Defendants agree that, because this is a legal
 22 question, it should be capable of resolution on summary judgment.

23 **2. Deadline for Joining Additional Parties:**

24 The Parties propose to add any and all additional parties by April 22, 2019.

25 **3. Assignment to a Magistrate Judge:**

26 The Parties do not consent to assignment of the case to a Magistrate Judge.

27 **4. Discovery Plan:**

1 (A) Initial disclosures: The Parties exchanged initial disclosures November 5, 2018.

2 (B) Subjects, timing, and potential phasing of discovery:

3 The Parties agree to set the deadline for completion of fact discovery on November 20,
4 2019, but agree to set separate deadlines for expert disclosures and depositions. Namely, opening
5 experts' disclosures and reports due December 20, 2019, and rebuttal expert's disclosure and
6 report due January 19, 2020. Depositions of experts shall be completed by March 19, 2020.

7 Plaintiffs' position: Plaintiffs anticipate conducting discovery, potentially to include
8 30(b)(6) depositions, on at least the following topics: Defendants' policies and practices
9 concerning the timing and scheduling of credible fear determinations for members of the
10 Credible Fear Interview class ("CFI Class"); Defendants' policies and practices concerning the
11 timing and scheduling of bond hearings for members of the Bond Hearing class ("BH class");
12 Defendants' policies and practices concerning bond hearing procedures; the impact that delays
13 and procedural deficiencies have on class members; and any relevant training materials
14 concerning the aforementioned policies and practices. Plaintiffs anticipate needing
15 approximately eight (8) months for discovery and, therefore, ask this Court to set the deadline for
16 completion of discovery on November 20, 2019. Plaintiffs do not believe that court-imposed
17 phasing of discovery would be appropriate.
18

19 Defendants' position: Defendants anticipate conducting discovery, to include depositions
20 of class members and others who have submitted written testimony in this case. Defendants also
21 anticipate serving written discovery to investigate Plaintiffs' claims and to identify areas of
22 agreement between the parties. Defendants foresee significant difficulty in searching and
23 providing documentary information related to local practices and training materials on these
24 subjects as practices have the potential to vary in every area of responsibility for each of the
25 Defendant organizations. Because Plaintiffs argued for the certification of two nationwide class
26 based upon the existence of a national policy and have maintained that local differences in
27 practice are not relevant to the appropriate legal analysis, the value of local practice or training
28 information is proportionally very small as compared to the burden imposed by conducting a

1 nationwide search. Defendants therefore believe that eight (8) months of fact discovery is
2 sufficient only if the parties can work together to narrow the scope and minimize the burden of
3 the production requests. Defendants believe that concluding fact discovery before proceeding to
4 expert discovery is appropriate.

5 (C) Electronically stored information (ESI):

6 Plaintiffs' position: Plaintiffs anticipate that they will have little, if any, ESI to produce.
7 Plaintiffs anticipate, however, that Defendants may have substantial amounts of ESI to produce,
8 including database records. Plaintiffs propose that the Parties adopt the Western District of
9 Washington's Model Agreement Regarding Discovery of Electronically Stored Information in
10 Civil Litigation.

11 Defendants' position: Defendants anticipate that they may have some ESI to produce, but
12 believe that the bulk of the discoverable information will be in the form of published policies and
13 not documents found through key word searches. Defendants anticipate problems with electronic
14 searches, because using search terms in a case like this may result in very large numbers of non-
15 responsive documents. Documents identified in key word searches will require individual review
16 as the terms are certain to capture documents protected from disclosure by privilege, statute, or
17 regulation which prevent disclosure of any information regarding persons found to have a credible
18 fear. Defendants are still in the process of investigating their ability to comply with the Model
19 ESI agreement at this time due to in part to some major changes that are happening with
20 Defendants' ESI and discovery systems, and are evaluating the most efficient way to produce
21 any relevant information. Defendants believe it would be more appropriate for the parties to
22 continue their discussions on this topic and separately submit a proposed ESI order setting out
23 each side's positions within 30 days.

24 (D) Privilege issues:

25 The Parties' position: If either Party discovers that it inadvertently produced privileged
26 information, the disclosing Party shall notify the receiving Party of the inadvertent disclosure and
27 the receiving Party will return the documents. This matter will be addressed in further detail in
28

the protective order that the Parties will file in anticipation of discovery production.

Defendants' addendum: Defendants are prevented, even under a protective order, from releasing information related to an individual with a credible fear. Although we anticipate agreeing to a claw back provision in the protective order, that provision will not relieve Defendants of their statutory and regulatory obligations to individually review documents prior to production.

(E) Proposed limitations on discovery:

Plaintiffs' position: Plaintiffs believe the Court should apply the limitations on discovery imposed by the Federal Rules of Civil Procedure and Local Civil Rules.

Defendants' Position: Defendants propose limiting production requests to twenty-five requests per side. Defendants also request that in responding to requests for production that the responding party be permitted to serve objections within 30 days, and to begin production within 30 days of an agreement on appropriate search parameters. We believe these limitations to be necessary due to the expected volume of documents and complexity of privilege review. Given that this case concerns the policies and practices of Defendants, Defendants do not anticipate the need to provide discovery regarding the substance of any individual alien's case or identity, and that would in any case be protected by statute or regulation.

(F) The need for any discovery related orders: The Parties request a Rule 16(b) Scheduling Order. They have agreed to the deadlines presented below.

Discovery	Plaintiffs' Deadline	Defendants' Deadline
Join additional parties	April 22, 2019	April 22, 2019
Amended pleadings	May 22, 2019*	May 22, 2019*
Completion of fact discovery	November 20, 2019	November 20, 2019
Completion of expert discovery	March 19, 2020	March 19, 2020
Dispositive motions	May 2, 2020	May 2, 2020
Motions in limine	30 days before trial	30 days before trial
Pretrial conference	2 weeks prior to trial	2 weeks prior to trial

Plaintiffs' addendum: if the Attorney General issues a decision in *Matter of M-S-*

purporting to eliminate the right to bond hearings for Bond Hearing Class members, such action provides Plaintiffs with good cause pursuant to FRCP 16 to amend the scheduling order and the complaint if the deadline for amending the complaint has past.

5. The parties' views, proposals, and agreements, on items set forth in Local Civil Rule 26(f)(1)

(A) Prompt case resolution:

The Parties' position: The Parties remain willing to discuss possibilities for promptly settling or otherwise resolving this case.

(B) Alternative dispute resolution:

The Parties' position: Neither Party can predict at this time whether trial will be necessary, but the Parties believe that resolution by summary judgment is reasonably likely. Therefore, at this time, they do not intend to utilize the Individualized Trial Program or an Alternative Dispute Resolution option.

(C) Related cases:

The Parties position: Although some of the individual immigration cases of the named Plaintiffs and many of the cases of class members are pending before the Executive Office for Immigration Review, the Parties are aware of no related cases raising the claims in this action pending before another federal or state court, or before an arbitrator.

(D) Discovery management:

The Parties' position: The Parties are willing to work together to manage discovery in a way that will promote the expeditious and inexpensive resolution of the case. In particular, the Parties will consider requesting the assistance of a magistrate judge for mediation and/or settlement conferences. Neither Party agrees to forgo or limit depositions, exchange documents informally, or use an abbreviated pretrial order. The Parties reserve the right to request discovery and/or case management conferences with the Court.

(E) Anticipated discovery sought:

1 Plaintiffs' position: Plaintiffs anticipate conducting discovery, including 30(b)(6)
 2 depositions, on at least the following topics: Defendants' policies and practices concerning the
 3 timing and scheduling of credible fear determinations for members of the Credible Fear
 4 Interview class ("CFI Class"); Defendants' policies and practices concerning the timing and
 5 scheduling of bond hearings for members of the Bond Hearing class ("BH class"); Defendants'
 6 policies and practices concerning bond hearing procedures; any relevant training materials
 7 concerning the aforementioned policies and practices; and the impact of such policies and
 8 practices on class members.

9 Defendants' position: Defendants anticipate conducting discovery, to include depositions
 10 of class members and others who have submitted written testimony in this case. Defendants also
 11 anticipate serving written discovery to investigate Plaintiffs' claims and to identify areas of
 12 agreement between the parties. Defendants foresee tremendous difficulty in searching and
 13 providing documentary information related to local practices and training materials on these
 14 subjects as practices have the potential to vary in every area of responsibility for each of the
 15 Defendant organizations. Because Plaintiffs argued for the certification of two nationwide class
 16 based upon the existence of a national policy and have maintained that local differences in
 17 practice are not relevant to the appropriate legal analysis, the value of local practice or training
 18 information is proportionally very small as compared to the burden imposed by conducting a
 19 nationwide search. Defendants therefore believe that the parties should work together to narrow
 20 the scope and minimize the burden of the production requests.

21 (F) Phasing motions:

22 The Parties position: The Parties request the opportunity to file separate, or phased,
 23 motions for summary judgment on each claim. Each count presents unique legal issues that may
 24 be ready for adjudication at different stages of the case. In addition, the classes are represented
 25 by different sets of individuals and have different sets of undisputed facts that will be relevant to
 26 the adjudication of the claims. The issues can be more clearly addressed in distinct motions.
 27

28 (G) Preservation of discoverable information:

1 Defendants have implemented litigation holds at each of the relevant agencies.

2 (H) Privilege issues:

3 The Parties' position: If either Party discovers that it inadvertently produced privileged
4 information, the disclosing Party shall notify the receiving Party of the inadvertent disclosure and
5 the receiving Party will return the documents. This matter will be addressed in further detail in
6 the protective order that the parties will file in anticipation of discovery.

7 Defendants' addendum: Defendants reiterate that in addition to privileged material, there
8 will likely be material that is protected by statute or regulation, and a protective order and/or
9 clawback agreement would not relieve Defendants of their obligation to prevent the disclosure of
10 such protected information.

11 (I) ESI:

12 Plaintiffs' position: Plaintiffs anticipate that they will have little, if any, ESI to produce.
13 Plaintiffs anticipate, however, that Defendants may have substantial amounts of ESI to produce.
14 Plaintiffs propose that the Parties adopt the Western District of Washington's Model Agreement
15 Regarding Discovery of Electronically Stored Information in Civil Litigation.

16 Defendants' position: Defendants anticipate that they may have some ESI to produce, but
17 believe that the bulk of the discoverable information will be in the form of published policies and
18 not documents found through key word searches. Defendants anticipate that electronic searches
19 using search terms likely will result in very large numbers of non-responsive documents, which
20 will require individual review to capture documents protected from disclosure by privilege,
21 statute, or regulation protecting disclosure of any information regarding persons found to have a
22 credible fear. At this time, Defendants are still in the process of investigating their ability to
23 comply with the Model ESI agreement due to in part to some major changes that are happening
24 with Defendants' ESI and discovery systems, and are evaluating the most efficient way to
25 produce any relevant information. Defendants believe it would be more appropriate for the
26 parties to continue their discussions on this topic and separately submit a proposed ESI order
27 setting out each side's positions within 30 days.
28

1 (J) Alternatives to Model ESI Agreement:

2 The Parties' position: The Parties agree that because Defendants are in the process of
3 migrating systems and understanding their limitations, Defendant request that the parties
4 continue discussions and submit a proposed ESI order within 30 days.

5 **6. Date of completion of discovery:** November 20, 2019, with the exception of Expert
6 discovery, which will be completed by March 19, 2020.

7 **7. Bifurcation of trial or other issues:**

8 The Parties' position: The Parties submit that the case is not amenable to bifurcation at
9 this time.

10 **8. Whether to dispense with, in whole or in part, pretrial statements and pretrial order**
11 **called for by Local Civil Rules 16(e), (h), (i), and k, and 16.1 for the sake of economy:**

12 The Parties' position: The Parties do not wish to dispense with the pretrial statements
13 and orders called for by the aforementioned Local Rules.

14 **9. Other suggestions for shortening or simplifying the case:**

15 The Parties' position: The Parties do not have any suggestions for shortening or
16 simplifying the case at this time, but will work cooperatively to identify such opportunities,
17 including the possibility of stipulating to any undisputed facts.

18 **10. Date case will be ready for trial:** September 14, 2020

19 **11. Trial by jury or non-jury:** Non-jury.

20 **12. Number of trial days required:** Five (5) to ten (10) days.

21 **13. Names, addresses, and telephone numbers of all trial counsel:**

22 Plaintiffs' trial counsel: Matt Adams, Leila Kang, Aaron Korthuis, Northwest Immigrant
23 Rights Project, 615 Second Ave., Ste. 400, Seattle, WA 98104, (206) 957-8611; Trina Realmuto,
24 Kristin Macleod-Ball, American Immigration Council, 1318 Beacon Street, Suite 18, Brookline,
25 MA 02446, (857) 305-3600.

26 Defendants' trial counsel: Lauren C. Bingham, PO Box 868, Ben Franklin Station,
27 Washington, DC 20044 (202) 616-4458); Sarah Wilson, 1801 4th Avenue North, Birmingham,
28

AL 35203 (205-244-2140).

14. Dates on which trial counsel may have complications: We are not currently aware of any trial-date conflicts.

15. Service: Plaintiffs, through their counsel, have effectuated service on all Defendants.

16. Request for a scheduling conference prior to entry of a scheduling order:

The Parties' position: The Parties do not request a scheduling conference prior to entry of a scheduling order.

17. Date(s) by which all nongovernmental corporate parties filed their disclosure

statement: There are no nongovernmental corporate parties in this case at this time.

DATED this 20th day of March, 2019.

<i>Attorneys for Plaintiffs and Class Members:</i>	<i>Attorneys for Defendants:</i>
<p><u>s/Matt Adams</u>, WSBA No. 28287 <u>s/Leila Kang</u>, WSBA No. 48048 <u>s/Aaron Korthuis</u>, WSBA No. 53974</p> <p>Northwest Immigrant Rights Project 615 Second Ave., Ste. 400 Seattle, WA 98104 (206) 957-8611 (206) 587-4025 (fax)</p> <p><u>s/Trina Realmuto</u>, admitted <i>pro hac vice</i> <u>s/Kristin Macleod-Ball</u>, admitted <i>pro hac vice</i></p> <p>American Immigration Council 1318 Beacon Street, Ste. 18 Brookline, MA 02446 (857) 305-3600</p>	<p>JOSEPH H. HUNT Assistant Attorney General</p> <p>WILLIAM C. PEACHEY Director</p> <p>EREZ REUVENI Assistant Director</p> <p><u>s/ Lauren C. Bingham</u> LAUREN C. BINGHAM, Fl. Bar # 105745 Trial Attorney U.S. Department of Justice Civil Division Office of Immigration Litigation District Court Section P.O. Box 868 Ben Franklin Station Washington, DC 2004 Telephone: (202) 616-4458 Fax: (202) 305-7000 Email: Lauren.C.Bingham@usdoj.gov</p> <p>SARAH S. WILSON Assistant United States Attorney</p>